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In the Supreme Court of the United States

PENNSYLVANIA DEPARTMENT OF CORRECTIONS,
PETITIONER

v.

GEORGE KOSLOW, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is subject to suit for damages for disability discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, because it waived its Eleventh Amendment immunity when it applied for and accepted federal financial assistance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 302 F.3d 161. The opinion of the district court (Pet. App. 38a-49a) is reported at 158 F. Supp. 2d 539.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2002. The petition for a writ of certiorari was filed on November 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. 794(a). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. See 29 U.S.C. 794a(a); *Barnes* v. *Gorman*, 536 U.S. 181 (2002); *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999).

In 1985, this Court held that the text of Section 504 was not sufficiently clear to evidence Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damage actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003(a), 100 Stat. 1845. Section 2000d-7(a) provides, in relevant part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794] * * *.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

2. In October 1988, respondent George Koslow was hired by petitioner Pennsylvania Department of Corrections as a water treatment plant supervisor for the State Correctional Institute in Graterford, Pennsylvania. The Correctional Institute is a state prison receiving federal funds. Pet. App. 3a. In 1995, Koslow injured his lower back while working and thereafter requested relief from performing certain tasks at work. *Ibid.* His employer responded that he must either return to work or be placed on workers' compensation leave. *Ibid.* Koslow chose to return to work, remaining in a position that required him to perform certain functions he was unable to accomplish due to his injury. *Ibid.* In February 2000, Koslow's employer fired him because he was unable to perform "essential functions" of his job. *Id.* at 3a-4a. Koslow filed suit against petitioner, asserting claims under, *inter alia*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, based on petitioner's alleged failure to provide a reasonable accommodation for Koslow's disability.[1] Pet. App. 38a.

The district court held that Section 504 does not validly abrogate States' Eleventh Amendment immunity to private damages suits and that a State does not

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[1] Koslow also filed claims under Titles I and II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111-12117, 12131-12165. The district court dismissed both claims as barred by the Eleventh Amendment. Pet. App. 39a-40a. Koslow did not appeal the dismissal of his Title II claim. See Pet. App. 5a n.3. He did appeal the dismissal of his Title I claim, and the court of appeals held that Koslow could pursue that claim for prospective injunctive relief against state officials in their official capacities under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Pet. App. 27a-32a. Petitioner has not challenged that ruling in this Court.

waive its immunity by applying for and accepting federal financial assistance. Pet. App. 41a-44a.

3. Koslow appealed. The court of appeals reversed the district court's holding on Section 504.[2] Pet. App. 1a-37a. The court found that the plain language of Section 504 puts States on notice that, by accepting federal financial assistance, they waive their immunity under the Eleventh Amendment to private damages suits. *Id.* at 14a-18a. The court also rejected petitioner's contentions that conditioning the receipt of federal funds on a State's waiver of Eleventh Amendment immunity constituted an "unconstitutional condition[]," *id.* at 19a-22a, and that Section 504 is not valid Spending Clause legislation because the conditions placed upon federal funds are unrelated to the purpose of those funds, *id.* at 23a-26a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. This Court recently denied petitions for writs of certiorari in *Hawaii* v. *Vinson*, No. 01-1878 (Jan. 13, 2003), *Chandler* v. *Lovell*, No. 02-545 (Jan. 13, 2003), and *Ohio Environmental Protection Agency* v. *Nihiser*, 122 S. Ct. 2588 (2002) (No. 01-1357). Those cases presented legal claims virtually identical to that presented by petitioner. Accordingly, further review is not warranted.

Section 2000d-7(a) of Title 42 provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in

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[2] The United States moved to intervene in the court of appeals for the purpose of defending the constitutionality of Section 504 as applied to the States, and the court granted that motion on November 23, 2001.

Federal court for a violation of section 504 of the Rehabilitation Act of 1973." 42 U.S.C. 2000d-7(a). Petitioner does not dispute that, when it applied for and received the federal financial assistance at issue in this case, it had been put on clear notice of the conditions Congress placed on those funds, including the requirement that a state recipient waive its immunity under the Eleventh Amendment.[3] Nor does petitioner contend that the condition Congress has placed on the receipt of federal funds is not "related" to the funds, as required under *South Dakota* v. *Dole*, 483 U.S. 203 (1987). Rather, petitioner contends (Pet. 10-15) that Congress has not validly conditioned a State's receipt of federal funds on the State's waiver of Eleventh Amendment immunity because placing such a condition on the

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[3] The courts of appeals have uniformly held that Section 2000d-7 unambiguously conditions receipt of federal funds on a waiver of Eleventh Amendment immunity. See *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000); *Nihiser* v. *Ohio Envtl. Prot. Agency*, 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 122 S. Ct. 2588 (2002); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Jim C.* v. *United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 122 S. Ct. 2591 (2002); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001). Even the Second Circuit, which has held that the application of Section 504 to the States was for a time foreclosed because of concerns about notice to the States of their obligations, has not disputed that Section 504 may generally be applied to the States in the future, now that those concerns have dissipated. See *Garcia* v. *State Univ. of N.Y. Health Sci. Ctr.*, 280 F.3d 98, 113-115 (2001).

application and acceptance of funds is an unconstitutional condition.

This Court has repeatedly affirmed Congress's authority to condition a State's receipt of federal financial assistance on acceptance of federal conditions, including a waiver of Eleventh Amendment immunity. In *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Court expressly stated that "a waiver [of immunity] may be found in a State's acceptance of a federal grant." *Id.* at 678 n.2 (citation omitted). This Court further made clear that its recent sovereign immunity cases have done nothing to undermine well-settled authority under which Congress may condition federal "gifts," such as federal financial assistance, on a State's waiver of sovereign immunity. See *id.* at 686-687.

Petitioner argues that this Court should review this case in order to resolve what it characterizes as "tension" between the Court's unconstitutional conditions cases and statements in *Alden* v. *Maine*, 527 U.S. 706 (1999), and *College Savings Bank*. There is, however, no such tension. Waivers of sovereign immunity are governed by a separate body of law than issues involving unconstitutional conditions on the exercise of individual rights. It is not surprising, therefore, that no court of appeals—indeed, none of the appellate judges who have questioned the applicability of Section 504 to the States on other grounds—has suggested that Section 504 is invalid as applied to the States because it conflicts with this Court's unconstitutional conditions cases. See Pet. 9 (citing appellate cases upholding Section 504 and dissenting opinions). As this Court's cases cited by petitioner (Pet. 10-13) demonstrate, the Court's unconstitutional conditions cases involve the relationship between the government and private

individuals. In contrast, *Alden* and *College Savings Bank* rely on this Court's decisions in *Dole* and *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959). Those decisions expressly address the authority of the federal government to condition financial assistance to States on their agreement to waive Eleventh Amendment immunity, and those Spending Clause and federalism opinions, rather than the inapposite unconstitutional conditions cases, control the disposition of this case.[4]

As petitioner concedes (Pet. 13), this Court has never applied the unconstitutional conditions doctrine in the Eleventh Amendment context.[5] That is true even

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[4] Petitioner contends that, under the unconstitutional conditions doctrine, "a person may not be compelled to choose between the exercise of a [constitutional] right and participation in an otherwise available public program." Pet. 13 (quoting *Thomas* v. *Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981)). But the unconstitutional conditions doctrine does not provide that Congress may *never* condition a benefit on the waiver of a constitutional right. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam) (federal government may condition federal money to candidates who comply with spending limits even if First Amendment protects right to spend unlimited amounts on campaign); *Wyman* v. *James*, 400 U.S. 309, 317-318 (1971) (State may condition welfare benefits on individual's consent to inspection of home without probable cause). Instead, the doctrine simply provides that "the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the benefit sought has *little or no relationship* to the [right]." *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994) (emphasis added).

[5] The "unconstitutional conditions" doctrine has never been applied to the relations between co-sovereigns. Instead, the doctrine was developed in light of the potentially coercive relationship between a government and individual citizens dependent on certain government "privileges" for daily living. See *Frost & Frost*

though the Court has expressly addressed the validity of conditioning federal funds on the waiver of sovereign immunity.

In *Petty*, for example, this Court held that Congress could condition its grant of a gratuity under one of its Article I powers on the States' agreement to waive their Eleventh Amendment immunity from suit. *Petty* involved two States that desired to enter an interstate compact to create a bi-state agency to build bridges and operate a ferry service. Under the Constitution, Congress must consent to such compacts. Congress agreed to authorize the compact, but only if the States agreed to accept a provision that would authorize federal courts to have jurisdiction over claims against the bi-state agency. The States agreed. The Court held that the "question here is whether Tennessee and Missouri have waived their immunity under the facts of this case," and concluded that they had because "[t]he States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached." 359 U.S. at 277, 281-282. *Petty* could not have come out the same way if, as petitioner contends, Congress can never require a State to waive the immunity of one of its agencies in exchange for a federal benefit.

Petitioner argues (Pet. 14-15) that *Petty* is distinguishable because the "state financial and dignitary interests which underlie Eleventh Amendment immunity" were only "minimally implicated" by the compact at issue in that case. But a State's financial and dignitary

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Trucking Co. v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926). The relationship between sovereigns is of a different nature, and States are protected against federal coercion by other doctrines. See, *e.g.*, *New York* v. *United States*, 505 U.S. 144 (1992).

interests in not answering to private suits in federal court remain constant regardless of the circumstances giving rise to the suit. Indeed, in *College Savings Bank*, this Court equated Congress's exercise of its authority in *Petty* with the Spending Clause power and suggested that Congress was free to condition exercise of either power on the waiver of the State's immunity. 527 U.S. at 686-687.

Moreover, the Court assumed in *Dole* that the Twenty-First Amendment vested the States with sole authority to set the drinking age. 483 U.S. at 209. But the Court explained that the vesting of that authority in the States did not prevent Congress from attempting to influence the States' exercise of their authority through an offer or withdrawal of federal funds.

> [Our] cases establish that the "independent constitutional bar" limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.

Id. at 210-211.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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